

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA)
)
)
v.) CR. NO. 2:07-CR-136-MHT
)
KEITH ANDERSON)
)

**ADDENDUM TO THE GOVERNMENT'S SUPPLEMENTAL BRIEF ON
THE APPLICATION OF *Deal v. United States***

Comes now the United States of America, by and through Leura G. Canary, United States Attorney for the Middle District of Alabama, and files an addendum to its supplemental brief regarding the application of *Deal v. United States*, 508 U.S. 129 (1993), to the "prior conviction" language in 18 U.S.C. § 2252A(b).

The undersigned attorney recently was made aware of the following:

- The issue at hand has already been presented to this Court in the case of *United States v. Michael David King* (2:05cr301-WHA);
- A ruling from the Honorable Senior Judge W. Harold Albritton III in that case held directly contrary to the position of the United States in this case (*see* attached Sentencing Tr. at 11-14);
- The United States subsequently sought and obtained approval from the Solicitor General of the United States to appeal that decision for the reasons stated in the Government's earlier briefs in this case; and
- The issue and the arguments put forth by the Government in this case are currently before the Eleventh Circuit Court of Appeals in the case of *United States v. Michael David King*, 07-11808.

This Court should also be advised that the undersigned attorney is unaware of any other federal case that directly speaks to this issue, as it appears to be a matter of first impression not only in the Eleventh Circuit, but also throughout the country.

Respectfully submitted,

LEURA G. CANARY
UNITED STATES ATTORNEY

/s/ Nathan D. Stump
NATHAN D. STUMP
Assistant United States Attorney
United States Attorney's Office
131 Clayton Street
Montgomery, AL 36104
Tel: (334) 223-7280
Fax: (334) 223-7560
Email: nathan.stump@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to defense counsel Keith Rodgers, Esq. and Stephen NeSmith, Esq.

Respectfully submitted,

/s/Nathan D. Stump
NATHAN D. STUMP
Assistant United States Attorney
131 Clayton Street
Montgomery, AL 36104-3429
Tel: (334) 223-7280
Fax: (334) 223-7560
Email: nathan.stump@usdoj.gov

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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE MIDDLE DISTRICT OF ALABAMA
3 NORTHERN DIVISION
4
5 UNITED STATES OF AMERICA
6 vs. CASE NO.: 2:05cr301-WHA
7 MICHAEL DAVID KING,
8 Defendant.

10
11 * * * * * * * * * * * * *
12 SENTENCING HEARING
13 * * * * * * * * * * * * *
14
15 BEFORE THE HONORABLE W. HAROLD ALBRITTON, UNITED
16 STATES DISTRICT JUDGE, at Montgomery, Alabama, on Tuesday,
17 April 10, 2007, commencing at 2:28 p.m.
18 APPEARANCES:
19 FOR THE GOVERNMENT: Mr. Andrew O. Schiff
20 Mr. John T. Harmon
21 Assistant United States Attorneys
OFFICE OF THE UNITED STATES ATTORNEY
One Court Square, Suite 201
Montgomery, Alabama 36104
22 FOR THE DEFENDANT: Mr. Jeffery C. Duffey, Attorney at Law
LAW OFFICE OF JEFFERY C. DUFFEY
600 South McDonough Street
Montgomery, Alabama 36104
23
24 Proceedings reported stenographically;
25 transcript produced by computer.

RISA L. ENTREKIN, RDR, CRR, OFFICIAL COURT REPORTER
U.S. DISTRICT COURT, MIDDLE DISTRICT OF ALABAMA
ONE CHURCH STREET, MONTGOMERY, AL 36104 334-240-2405

1 (The following proceedings were heard before the Honorable
2 W. Harold Albritton, United States District Judge, at
3 Montgomery, Alabama, on Tuesday, April 10, 2007, commencing
4 at 2:28 p.m.:)

5 THE COURT: All right. I'll call the case of United
6 States of America versus Michael David King. Is the government
7 ready to proceed?

8 MR. SCHIFF: Yes, Your Honor. Good afternoon.

9 THE COURT: All right. Mr. Schiff. Mr. Harmon.

10 MR. HARMON: Good afternoon, Your Honor.

11 THE COURT: Is the defendant ready to proceed?

12 MR. DUFFEY: Yes, sir.

13 THE COURT: Mr. Duffey.

14 MR. DUFFEY: Yes, sir.

15 THE COURT: Come forward, please.

16 Swear in the defendant.

17 THE CLERK: Would you raise your right hand, please.

18 (The defendant is sworn)

19 THE COURT: All right. Mr. King, have you, and
20 Mr. Duffey, have you, as defense counsel, reviewed the
21 presentence report, including any revision that may have been
22 made after the initial disclosures?

23 MR. DUFFEY: Yes, sir.

24 THE COURT: Have you, Mr. King?

25 THE DEFENDANT: To the best of my knowledge, yes, sir.

1 THE COURT: All right. The presentence report shows
 2 two objections. One is that the defendant states that he's not
 3 able to pay a fine, and I understand that and will take it into
 4 consideration. I don't view that as -- I don't view that as
 5 necessary to the sentence, because I don't think that it's
 6 actually an objection. The profile indicates that he could be
 7 able to pay a fine on liquidation of his assets, but whether he
 8 should be is another matter. And I'll take all this into
 9 consideration on whether a fine should be imposed, but I
 10 overrule that objection.

11 MR. DUFFEY: Yes, sir.

12 THE COURT: Now, the first objection says that the
 13 defendant stated that he did not access the pornographic
 14 information in his dorm room; the information was already on his
 15 computer, which was located in his dorm room. I simply don't
 16 understand that objection.

17 MR. DUFFEY: Judge, if I may, it's somewhat
 18 complicated. And this was testified about at the suppression
 19 hearing, I believe, by --

20 THE COURT: I recall that --

21 MR. DUFFEY: -- Agent LaMar. The proxy server, as I
 22 understand the testimony, can determine whether or not any
 23 computer on the network has accessed the Internet or the Web.
 24 Agent LaMar did a proxy search to see if his computer had
 25 accessed the Internet. And she had specific dates that she put

1 in her statement, which was introduced into evidence. And in
 2 her statement, she said that she determined that there was no
 3 activity that violated General Order Number 1. There was no --
 4 no violation at all of accessing the Internet from the computer
 5 that was in the -- the actual dorm room. As I understand the
 6 testimony, Agent LaMar then searched the individual computer
 7 that was sitting in the dorm room, the laptop computer, and got
 8 into the hard drive of the computer. There are also proxy --
 9 proxy logs?

10 THE DEFENDANT: No. Internet history logs and file
 11 access logs.

12 MR. DUFFEY: Okay. There are other logs on the
 13 computer itself that will show everything that was downloaded,
 14 searched, whether or not the Internet was accessed. That's when
 15 she determined that access had been made and files had been
 16 saved previously, but it had not been done from that location.
 17 These matters were brought into the room, as I understand the
 18 evidence.

19 THE COURT: All right. Well --

20 MR. DUFFEY: In other words, it was a search of the
 21 computer. And this is part of our -- the reason I brought this
 22 up, we're trying to be consistent with what we've alleged in our
 23 motion to suppress -- is that the actual search of the computer
 24 is where that revealed that information. It was not of the
 25 proxy logs itself.

3

1 THE COURT: Well, since the defendant has pleaded
 2 guilty to one and three, as I understand it, then, this
 3 objection must be to simply preserve your position for appeal on
 4 the motion to suppress issue. It doesn't make any difference in
 5 sentencing, does it?

6 MR. DUFFEY: That's correct. That's correct, Your
 7 Honor. That's the only reason we did it, because I didn't want
 8 to come up with something on appeal and then someone go back to
 9 the presentence report and say, well, it's different here and
 10 you didn't object to it. And I just want to make sure we're
 11 consistent in our argument. It doesn't make a difference in the
 12 sentencing, as I understand it.

13 THE COURT: All right. But I'm not sure what part of
 14 the presentence report you're objecting to, then. What is
 15 the --

16 MR. DUFFEY: Well, it was -- if the Court will just
 17 bear with me just one second.

18 THE COURT: All right.

19 PROBATION OFFICER: It's going to be in paragraph
 20 ten --

21 THE COURT: Paragraph ten?

22 PROBATION OFFICER: -- of the offense conduct.

23 THE COURT: All right.

24 PROBATION OFFICER: Line 7.

25 THE COURT: Okay. But is it the sentence, she also

4

1 stated that the defendant accessed this information from a
 2 computer located within his dorm room on base, in paragraph ten?

3 MR. DUFFEY: Yes, sir. She also stated that the
 4 defendant accessed this information from a computer located
 5 within the dorm room. The way I understand it, that should have
 6 read that Agent LaMar is the one who accessed it into the dorm
 7 room. There was never an allegation that Mr. King used the
 8 computer in the dorm room to access information through the
 9 server.

10 THE COURT: Now, the probation officer, Ms. Caple,
 11 responded that that statement was taken from a report of
 12 investigation and reiterated in an FBI report.

13 Ms. Caple, having heard the objection just stated, do
 14 you have any comment on that?

15 PROBATION OFFICER: Only to say that I am reiterating
 16 information in official government documents.

17 THE COURT: All right.

18 MR. DUFFEY: Judge, may I?

19 THE COURT: Yes.

20 MR. DUFFEY: What she said is correct. That statement
 21 does say that. But Defendant's Exhibit #2, which was introduced
 22 at the suppression hearing, was the statement of Agent LaMar
 23 herself. And in her statement, about a third of the way down,
 24 if I may just quote it, it says, I ran the proxy logs for his
 25 user name -- meaning him; it's his -- for 4 January '03, 8

5

1 February '03, 11 February '03, 12 February '03, 13 February '03,
 2 17 February '03, and 18 February '03. I did a thorough review
 3 of those logs and didn't find anything that violated GO-1, which
 4 is General Order 1.

5 Then she goes on to talk about searching his individual
 6 computer itself, which is different from the proxy logs. The
 7 proxy log shows if a computer on the network has accessed the
 8 Internet, any computer, and it did not show his computer had
 9 accessed the Internet for anything that would violate General
 10 Order Number 1, which would be pornography.

11 THE COURT: All right.

12 MR. DUFFEY: Sergeant O'Brien was her -- was the
 13 criminal investigator who did the overall investigation and
 14 report. So he did a report based upon a review of the other
 15 reports.

16 THE COURT: All right. Mr. Schiff, is there anything
 17 you'd like to say about this?

18 MR. SCHIFF: Yes, Your Honor. I mean given that this
 19 point really has nothing to do with anything material to
 20 sentencing, I mean the government would stipulate that for
 21 purposes of any appeal, the propriety of the search would be
 22 based on -- not on the PSI, which is a later-prepared document,
 23 but what was before the magistrate judge and the district court
 24 at the time of that search -- excuse me. At the time of that
 25 ruling.

1 THE COURT: All right. Mr. Duffey, do you want to
 2 present any evidence or any further argument on this?

3 MR. DUFFEY: No, sir. No, sir. We just want to make
 4 sure that we -- we didn't just let that go by in the event it
 5 would cause a problem on the motion that we filed.

6 THE COURT: All right. Well, let me say two things
 7 about this objection, then. The statement objected to will have
 8 no effect on the sentence in this case. And I -- and to the
 9 extent that that statement might in any way contradict the
 10 testimony on which the decision was made to deny the motion to
 11 suppress, I do not adopt that statement as part of the findings
 12 of fact. Otherwise, the objection is overruled.

13 Anything further on that point, Mr. Duffey?

14 MR. DUFFEY: No, sir. No, sir.

15 THE COURT: All right. Then having made findings as to
 16 those objections, I also have considered the government's motion
 17 for an additional level downward for acceptance of
 18 responsibility of three levels. I grant that motion and will
 19 take that into consideration in setting the advisory guideline
 20 range.

21 Having made findings to the objections, the Court finds
 22 that the offense level is 30, the criminal history category is
 23 I, the guideline range is from 97 months to 120 months, the
 24 supervised release period is from five years to life, and the
 25 fine range is from \$15,000 to \$150,000. This is before

7 1 consideration of whether or not there's a statutory minimum of
 2 120 months under 18 U.S.C., Section 2252A(b)(2), based on
 3 whether count one is a prior offense -- is a prior conviction,
 4 rather, prior to count two.

5 I have reviewed the motion of the government or the
 6 brief of the government, rather, the sentencing memorandum,
 7 taking the position that this first offense, the offense to
 8 which the defendant pleaded guilty of transporting child
 9 pornography, as to whether that should be considered a prior
 10 offense to count three, which is possession at some time later
 11 of child pornography. I've read that memorandum, and I've read
 12 the defendant's responsive memorandum. I've read the case and
 13 the statutes and have considered all of that. If there's
 14 anything further that the government wants to submit on that
 15 issue, I'll hear from you.

16 MR. SCHIFF: No. Unless the Court has any questions,
 17 the government would stand on its brief and the cases cited
 18 therein.

19 THE COURT: All right. Mr. Duffey?

20 MR. DUFFEY: Judge, if I could just point out a couple
 21 of things that's different in this case and the *Deal* case under
 22 the gun charge, the 924 statute. The statutes are worded
 23 completely different, and I think I put that in the memorandum.
 24 In this statute, it's a but if there's a prior conviction, it's
 25 to be enhanced. The other one says in the case of a second or

8 1 subsequent conviction.

2 It appears the Supreme Court at 508 U.S. 132 in the
 3 *Deal* case gave several reasons why they found the way they did.
 4 And one of them was -- and I'm looking at the second paragraph
 5 on that page, and I'll quote the last sentence, if I may. And
 6 this is dealing with 924(c)(1). It says, thus, if conviction in
 7 924(c)(1) meant judgment of conviction, the provision would be
 8 incoherent, prescribing that a sentence which has already been
 9 imposed, the defendant's second or subsequent conviction, shall
 10 be five or 20 years longer than it was.

11 In this case, they specifically say but if there's a
 12 prior conviction, which is completely different. They're saying
 13 there that it refers to the conviction itself as a second or
 14 subsequent conviction. The pornography statute does not refer
 15 to the same conviction. It says but if there is a prior
 16 conviction. So we contend that's different than the *Deal* case.

17 It also, on page -- 508 U.S. at page 133 in the *Deal*
 18 case, they also state that if they were to construe it any other
 19 way, it would give the prosecution unreviewable discretion in
 20 charging. They could either opt in or opt out. Under the
 21 pornography statute, 2255A (sic), they do not have that
 22 discretion because it's talking about a prior conviction, not if
 23 this one is the second or subsequent.

24 They also talk about in that opinion at page 137
 25 another reason is that if they didn't go with the interpretation

1 that the government maintained in the 924(c) case, that someone
 2 could go out and just evade detection, you know, the fact that
 3 they commit six robberies on six different days and then they
 4 evade detection and continue doing that, and they get a benefit
 5 that the statute really doesn't confer.

6 We don't have that in this case. You know, he was --
 7 he was caught in Saudi Arabia. He was sent back. And some
 8 three years later, they do a search of his home and find stuff
 9 on his computer. He was not attempting to evade anyone.
 10 Everybody knew where he was. It's different from a -- that type
 11 of offense where you use a gun in a robbery.

12 So we contend that in looking at the facts -- and they
 13 do state that they're looking -- in reviewing this case, they
 14 say in the context at issue. Well, we -- we contend this is a
 15 different context in looking at how you construe these -- these
 16 terms. And it is our contention that a prior conviction means
 17 that he must have previously been convicted of a crime before
 18 that would occur.

19 THE COURT: All right. Well, this is a case of first
 20 impression, and I understand the position taken by the
 21 government in it that *Deal* should be interpreted to go farther
 22 than was actually involved in that case and apply to the statute
 23 and the language in this case, but I'm not willing to do that.
 24 I've thought a lot about this, and I don't think that this
 25 ten-year maximum -- minimum, mandatory minimum enhancement,

1 applies in this case, and I want to tell you why.

2 First, the language is different in the two statutes.
 3 The present case under Section 2252A is not the same as what was
 4 involved in *Deal*, Section 924, which referred to a second or
 5 subsequent conviction. Here we're talking about a prior
 6 conviction. The language is similar in the two statutes, but I
 7 can't ignore that there are differences. And the basis for the
 8 government's interpretation is a case interpreting a different
 9 language, although similar, and to a different statute, which is
 10 not similar.

11 To make that decision and that jump would require this
 12 Court to stretch the *Deal* holding beyond what the Supreme Court
 13 was faced with at that time and I think different from the
 14 rationale that the Court used in making that determination. So
 15 without something further from the Supreme Court, I don't think
 16 that lower courts should be willing to stretch the *Deal*/
 17 precedent in cases outside of Section 924 unless we're dealing
 18 with a case involving identical language.

19 The second reason is that the facts of this case, as
 20 you point out, Mr. Duffey, differ significantly from the facts
 21 in the *Deal* case. In the *Deal* case, we had a string of bank
 22 robberies, the same type of thing, and all committed before he
 23 was caught. They were all presented in one prosecution, and
 24 they enhanced the defendant on the basis of it. And they say
 25 that as a rationale that doing it otherwise would make -- of

11 1 saying you couldn't do it that way would just simply give the
 2 prosecution too much discretion as to length of sentence by
 3 being able to prosecute one at a time and that being different
 4 from prosecuting them all together.

5 In this case, the facts are different. The defendant
 6 was charged with transportation of child pornography, and he was
 7 sent from Saudi Arabia back in 2003 as a result of that
 8 investigation in which that was found. It was not until three
 9 years later that he was actually prosecuted for that. I don't
 10 know exactly where this fits into the analysis; but I would
 11 point out that if the defendant had been prosecuted for that
 12 first offense shortly after it was discovered in Saudi Arabia,
 13 he would, in all likelihood, not have committed the second
 14 offense because he would have been in prison and, after that,
 15 unable to be involved with a computer. So without going into
 16 the reasons for that or the motives or why there was delay --
 17 there may well and probably was a substantial reason for that
 18 other than just tactical -- it is quite different from the fact
 19 situation in *Deal*.

20 So in summation, it would just -- it would stretch *Deal*/
 21 too far. The language -- the two languages themselves that
 22 would favor the defense side of this would be the clear language
 23 "prior sex conviction" in Section 3559 and "prior conviction" in
 24 Section 2252A. The government urges that the definition given
 25 in 3559 should make it different because the same definition was

12 1 not given in Section 2252A. But I don't find that that
 2 overrides the clear language of "prior sex conviction" and
 3 "prior conviction" being so similar that the mere fact that
 4 there is not a definition in 2252A is not sufficient to say that
 5 Congress intended for it to be different from the very similar
 6 language of "prior sex conviction."

7 For all of those reasons, I find that the enhancement
 8 is not due to be given. And I don't think there's a motion
 9 pending on that; but to the extent that that might be, I would
 10 deny it and I decline to hold -- and I hold that the ten-year
 11 minimum, mandatory minimum sentence, does not apply in this
 12 case.

13 Now, in determining a sentence that's reasonable and
 14 appropriate in this case, I'll hear from you, Mr. Duffey, if you
 15 have anything you'd like to say.

16 MR. DUFFEY: Yes, sir, Your Honor. If the Court would
 17 consider that Mr. King is retired military prior to this, had an
 18 unblemished record. He served honorably, honorable discharge
 19 after 20 years, had no prior criminal history.

20 Also, the specific crime that he's charged with and
 21 that he has pled guilty to involved possession of illegal
 22 images, child pornography. And he admits to that and
 23 understands he's going to be punished. But in this case,
 24 there's no charge and no allegation that he ever did any type of
 25 solicitation of a child. There is no evidence that he ever

1 swapped images with anyone else, sold images, or anything of
 2 that nature, which you see in a lot of these cases. His was
 3 merely possessing a great number of images. And so we contend
 4 that his case is somewhat different from a lot of people who
 5 come through the Court who are charged with violating 2252 -- or
 6 55A, and that the Court consider that.

7 And also consider in regards to the fine that in fact
 8 he -- when he was arrested, he had a very good job. He has a
 9 computer specialty. He's an expert in that area. And when he
 10 was on supervised release, he had to work as a waiter at
 11 Applebee's. That's the only kind of job he could get. His wife
 12 had to take -- she works at Toys R Us and had to take a second
 13 job at McDonald's. They have a 15-year-old child who is in
 14 school. They're in a tremendous financial bind and would ask
 15 the Court -- I understand the Court will consider all that, but
 16 we would ask the Court not to impose a fine in this case.

17 There are some other recommendations. I don't know if
 18 I need to get into those now, but there are some things I would
 19 like to bring up regarding some recommendations about conditions
 20 that would be placed on him.

21 THE COURT: You can go ahead.

22 MR. DUFFEY: There are certain recommendations, one
 23 specifically is that he should be restricted and not to have any
 24 contact with any children under the age of 18. He has a
 25 15-year-old son. And I just wanted to ask for clarification if

1 that applies to his child, because I'm sure there will be -- if
 2 the Court allows it, there will be telephone contact while he's
 3 in prison and possibly visitation contact. And when he is
 4 released at some point in the future, he'll be over 18; but at
 5 least while he's in prison, we would like to ask the Court for
 6 clarification that he be allowed to have contact with his son,
 7 who is under 18.

8 The last thing we would ask the Court to consider is
 9 the term of supervised release. And I believe it says five
 10 years to life. In this case, because of his situation and his
 11 background, his -- the fact that he served his country, the fact
 12 that he had never been in trouble before, and the fact that he
 13 will be subject to essentially a lifetime of registration as a
 14 sex offender both under federal law and state law, which are
 15 very restrictive -- he'll be restricted once he is released from
 16 prison, where he can live, have a special ID, things of that
 17 nature. And we would -- we would ask the Court to consider not
 18 imposing a lifetime of supervised release since he will already
 19 be under a great many different restrictions and ask the Court
 20 to impose a sentence of supervised release of ten years rather
 21 than life.

22 THE COURT: All right. Mr. King, is there anything
 23 you'd like to say?

24 THE DEFENDANT: No, sir.

25 THE COURT: All right. Mr. Schiff?

15

1 MR. SCHIFF: Yes, Your Honor. The government would
 2 request a sentence at or near the high end of the guideline
 3 range in this case. The government would rely on the number of
 4 the images, the nature of the images, and the repetitious nature
 5 of the conduct in this case.

6 In terms of the number of images, under the guide --
 7 under the guidelines, the maximum you can get points for is 600
 8 and over. In this case, the defendant is many, many times over
 9 that maximum number of images. I think that would -- well, I
 10 think that would even suggest a possibility of departure. The
 11 government has agreed to a sentence within the range, and the
 12 government feels that that is a factor suggesting the higher end
 13 of the range.

14 The nature of the images. It's summarized in paragraph
 15 12. Leave it to say in open court that these are very nasty,
 16 nasty images involving young children in just horrific, horrific
 17 acts of violence.

18 And finally, in terms of the repetition of the conduct,
 19 this is a defendant who was caught, who knew he was caught, and
 20 notwithstanding that, returned to the United States and
 21 recommitted the same offense. And therefore, I think it is a
 22 defendant who is less likely to rehabilitate than others and,
 23 again, a factor that would support a sentence towards the upper
 24 end of the guideline range.

25 In terms of the -- the government would not object to

16

1 exempting the son from visits with -- to the conditions being
 2 set so that the son could visit him in prison.

3 In terms of lifetime supervised release, the government
 4 feels that the Court should impose such a term with supervised
 5 release. After the defendant is released from prison, there's
 6 always the possibility the defendant could move for a reduction,
 7 but there's no way to increase it up if that turns out to be
 8 appropriate under the facts. And the guidelines do recommend a
 9 lifetime term in cases such as this. Thank you.

10 THE COURT: All right. Well, I've looked very
 11 carefully at all the matters involved in this case, and I've
 12 considered all the factors in 18 U.S.C., Section 3553(a), as
 13 well as the advisory guidelines, the facts and circumstances
 14 surrounding this case, and the individual background of the
 15 defendant.

16 There are things that mandate against a minimum
 17 sentence in this case. I have considered as part of that the
 18 fact that the defendant was asked to leave Saudi Arabia in 2003
 19 knowing that there was an investigation for possession of child
 20 pornography going on, knowing himself why that was and what he
 21 had taken to Saudi Arabia from here; but his activity continued
 22 in spite of that when he got back to this country to the extent
 23 that in 2006, he was found in possession of a substantial amount
 24 of child pornography still.

25 It strikes me along the lines of what Mr. Schiff was

17

18

1 suggesting that the range in this case would be the same if it
 2 were a much less -- I don't want to say less serious, but less
 3 voluminous, I guess, amount of evidence. It would be the
 4 same -- the range would be the same in this case if Mr. King --
 5 if there was only one minor who was prepubescent at the time.
 6 Here the presentence report shows that the majority on the 12
 7 CDs that were possessed by Mr. King, the majority -- I don't
 8 know how many that was, but so certainly more than one -- were
 9 prepubescent. So there were more than the minimum of that.

10 The range would have been the same if there had been
 11 600 images of child pornography. Here, the presentence report
 12 shows the fact that there were more than 30,000. At least 70 of
 13 those people in there were -- victims were identified by sources
 14 that were known by the federal government to be -- to identify
 15 them as children.

16 And third, if any of the material that had been found
 17 in the defendant's possession portrayed sadistic conduct or
 18 other violence, if any of it did, the range would have been the
 19 same. Here the presentence report and the facts in the
 20 presentence report show that most of the videos in the
 21 possession of the defendant depicted children bound with rope,
 22 handcuffs, and blindfolded and engaged in sadistic sex acts, and
 23 there were videos depicting rape and torture. All of those
 24 things are considered by me to mandate a sentence higher than
 25 the minimum sentence.

1 On the other hand, I have taken into consideration the
 2 history and characteristics of the defendant and the amount of
 3 time in his life that he's had no other offenses, and I've taken
 4 into serious consideration his 20 years of honorable military
 5 service.

6 Taking all of those things into consideration, it's my
 7 determination that a sentence in the middle of the guidelines,
 8 the recommended guidelines, would be reasonable in this case,
 9 and it's -- and I'm going to impose a sentence of 108 months.

10 However, I am going -- because of all of the
 11 exaggerated things that I have mentioned earlier, I've
 12 determined that a sentence of supervised release for the rest of
 13 your life, Mr. King, is appropriate in this case. You do have
 14 other supervision, but the other supervision can be done in
 15 conjunction with this supervision. And so I'm going to order
 16 supervised release for a period of life.

17 As to a fine, although assets could be liquidated and a
 18 fine paid, I don't find that to be appropriate. Defendant's
 19 family is more in need of whatever resources there might be
 20 available, and I'm not going to take those resources away from
 21 the family.

22 As to the no contact with children under the age of 18,
 23 I would make that to be no contact with children under the age
 24 of 18 other than his son with approval of the Federal Bureau of
 25 Prisons or the probation officer. Is that language agreeable to

19 1 the probation officer?
 2 PROBATION OFFICER: Well, Your Honor --
 3 THE COURT: Would that work?
 4 PROBATION OFFICER: -- as they were discussing that
 5 issue, I think the clarification is, is that this condition
 6 would not kick in until he was released on supervised release.
 7 So he's not even held by this condition for many years from
 8 today.
 9 THE COURT: Oh, that's correct. All right.
 10 PROBATION OFFICER: So I don't even think that it needs
 11 to be ruled on.
 12 THE COURT: That is correct. It's not a requirement
 13 during the time that the defendant would be in prison. That
 14 would be simply a matter of Federal Bureau of Prisons' policy.
 15 Do you agree with that, Mr. Duffey?
 16 MR. DUFFEY: Yes. The reason I did, I wasn't sure when
 17 the Bureau gets the presentence report if they would read
 18 that -- or if they get the sentencing judgment, if they would
 19 read that as saying he has no contact with his son. I just --
 20 that's why I wanted clarification.
 21 THE COURT: Well, it's not the intent of the Court for
 22 that to have any effect on Federal Bureau of Prisons' policies
 23 while the defendant is in prison. And it's correct that this
 24 specific provision in here only applies when he's on supervised
 25 release, which will be after the son is 15.

20 1 MR. DUFFEY: Yes, sir.
 2 THE COURT: Mr. Schiff, do you agree with all that? Is
 3 that --
 4 MR. SCHIFF: Yes, Your Honor.
 5 THE COURT: All right. Now, there also is a motion for
 6 forfeiture in this case, and I understand that's -- is that a
 7 part of the plea agreement as well?
 8 MR. HARMON: Your Honor, I don't know if it's part of
 9 the plea agreement. Mr. Duffey and I have worked together and
 10 have resolved it. If the Court will recall, the United States
 11 filed a bill of particulars listing certain items as being
 12 subject to forfeiture pursuant to the terms of the indictment.
 13 That was filed, Your Honor, on November the 21st of last year.
 14 Mr. Duffey wrote me, and there were some items that were listed
 15 on the bill of particulars that he contended were not subject to
 16 forfeiture. After consultation with appropriate officials from
 17 the government, we have agreed. Specifically, Your Honor, we
 18 are asking the Court to strike items two, four, six, 15, number
 19 17 through number 26, and 32 as no longer subject to
 20 forfeiture. Your Honor, we have filed a motion for a
 21 preliminary order of forfeiture. I don't -- I believe the Court
 22 has it. If not, I have a copy --
 23 THE COURT: I have received it. Did that delete those
 24 numbers?
 25 MR. HARMON: That did, Your Honor. And it now reflects

1 the -- the proposed preliminary order of forfeiture only
 2 addresses items other than those that I just referenced to the
 3 Court.

4 THE COURT: Mr. Duffey, have you reviewed that?

5 MR. DUFFEY: Yes, sir. Mr. Harmon is correct. We've
 6 agreed to that.

7 THE COURT: You've agreed to that.

8 MR. DUFFEY: Yes, sir.

9 THE COURT: All right. That motion is granted, and the
 10 forfeiture of the items not in the bill of particulars but the
 11 items listed in the government's motion for preliminary
 12 forfeiture will be included in the judgment.

13 MR. HARMON: Thank you, Your Honor.

14 THE COURT: The sentence will now be stated, but you
 15 will have a final chance to make legal objections before the
 16 sentence is imposed.

17 As I've stated earlier, I have evaluated the
 18 reasonableness of this case through the lens of Section 3553(a)
 19 of 18 U.S.C. Having done so, it's the order, judgment, and
 20 decree of the Court that the defendant is committed to the
 21 custody of the Federal Bureau of Prisons for a term of 108
 22 months, which term the Court determines to be reasonable. The
 23 Court recommends that you be designated to a facility where sex
 24 offender treatment is available, where your physical health
 25 needs, where your -- and where your physical health needs can be

1 addressed.

2 Upon release from imprisonment, you shall be placed on
 3 supervised release for a term of life. This term consists of
 4 life terms on each count, such terms to run concurrently.
 5 Within 72 hours of release from custody, you shall report to the
 6 probation office in the district to which you are released.
 7 While on supervised release, you shall comply with the mandatory
 8 and standard conditions of supervised release on file with this
 9 Court.

10 The Court also orders the following special
 11 conditions. You shall cooperate in the collection of DNA. You
 12 shall register as a sex offender as required by law. You shall
 13 participate in a program approved by the United States Probation
 14 Office for the treatment of monitoring of sex offenders. You
 15 shall have no contact with children under the age of 18 and will
 16 refrain from entering into any place where children normally
 17 congregate without written approval of the Court. You shall not
 18 possess any form of pornography, sexually stimulating, or
 19 sexually oriented material depicting children under the age of
 20 18. You shall not enter into any location where such
 21 pornography or erotica can be accessed, obtained, or viewed.

22 You shall not possess or use any computer or any device
 23 that can be accessed -- that can access the Internet except that
 24 you may, with the approval of the probation officer, use a
 25 computer in connection with authorized employment. You shall

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1 consent to third-party disclosure of any employer or potential
 2 employer concerning any computer-related restrictions that are
 3 imposed on you.

4 You shall submit your person and any property, house,
 5 residence, vehicle, papers, computer, or other electronic
 6 communications or data storage devices or media and effects to
 7 search at any time, with or without a warrant, by any law
 8 enforcement or probation officer with reasonable suspicion
 9 concerning a violation of a condition of supervised release or
 10 unlawful conduct and by any probation officer in the lawful
 11 discharge of the officer's supervision functions.

12 You shall pay to the U.S. District Court Clerk a
 13 special assessment fee of \$200, which is due immediately. The
 14 Court finds that there is no identifiable victim who incurred a
 15 financial loss as a result of this offense.

16 At this point, I must make a comment that I find no
 17 identifiable victim who incurred a financial loss as a result of
 18 this offense. As I've said earlier, it's been determined that
 19 there are at least 70 victims in this case who are children.
 20 Mr. Duffey is correct that this case is not a case where a
 21 defendant persuaded a child to be a part of child pornography
 22 directly or intimidated or touched a person, but pornography
 23 such as I described earlier is only available because people buy
 24 it and there's a market for it. And when there's a market for
 25 it, it causes people to be willing to take little children and

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1 cause them to be filmed in the type of activity that I've
 2 described. If it were not for the market and for people like
 3 the defendant here who would buy that type of pornography, it
 4 wouldn't exist. Every one of those children in those pictures
 5 are victims. So I want to be clear that my finding is only that
 6 there is no identifiable victim who incurred a financial loss as
 7 a result of this offense.

8 Mr. King, you are committed to the -- you are remanded
 9 to the custody of the United States Marshal.

10 Now, are there any objections to the sentence or to the
 11 manner in which the Court pronounced it? For example, do you
 12 have any objections to the Court's ultimate findings of fact or
 13 conclusions of law?

14 Mr. Duffey?

15 MR. DUFFEY: No, sir.

16 THE COURT: Mr. Schiff?

17 MR. SCHIFF: Yeah. For the record, the government
 18 would object to the Court's imposition of 108 months rather than
 19 the -- what the government contends is the statutory mandatory
 20 minimum with respect to count three of the indictment.

21 THE COURT: All right. Now, pursuant to the plea
 22 agreement, the right to appeal has been waived by the defendant
 23 with these exceptions: the order, document number 59,
 24 overruling defendant's objections to the magistrate judge's
 25 report and recommendation and denying his motion to suppress --

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1 that was document number 23, the motion was; the order, which is
 2 document number 60, denying the defendant's second motion to
 3 suppress, that motion being document number 52; the
 4 determination that the conviction on count one constitutes --
 5 well, I didn't make that determination.

6 So with those exceptions having to do with the motion
 7 to suppress, the two motions to suppress, the right of appeal
 8 has been waived; is that correct, Mr. Duffey?

9 MR. DUFFEY: Yes, sir. That was the only thing. We
 10 had reserved the right to appeal the motions to suppress.

11 THE COURT: All right.

12 MR. DUFFEY: And I think we'd reserved the right if the
 13 Court had ordered the enhancement, but the Court did not.

14 THE COURT: All right. And, of course, the government
 15 has preserved its position that the enhancement does apply,
 16 Mr. Schiff. Other than that, then, you agree that the defendant
 17 has waived the right to appeal except for those two exceptions,
 18 the exceptions involving the -- that the defendant has preserved
 19 his right to appeal as to the motions to suppress?

20 MR. SCHIFF: Are you addressing me?

21 THE COURT: Yes.

22 MR. SCHIFF: Oh, yes. I'm sorry. Yes, Your Honor.

23 The Court has correctly stated the exceptions to the waiver of
 24 appeal.

25 THE COURT: All right. Ms. Caple?

27 1 COURT REPORTER'S CERTIFICATE

2 I certify that the foregoing is a correct transcript
 3 from the record of proceedings in the above-entitled matter.

4 This 17th day of April, 2007.

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/s/ Risa L. Entrekin
 Registered Diplomatic Reporter
 Certified Realtime Reporter
 Official Court Reporter

1 PROBATION OFFICER: I just wanted to make one
 2 clarification for the record, that the sentences imposed are 108
 3 months as to count one and 108 months as to count three, such
 4 terms to run concurrently. We did not address the two separate
 5 counts.

6 THE COURT: Yes. I should have included that. The
 7 sentence of 108 months consists of 108 months on count one and
 8 108 months on count three, which terms are to be served
 9 consecutive -- concurrently. I'm sorry.

10 Thank you, Ms. Caple.

11 Then the sentence is ordered imposed as stated.

12 MR. SCHIFF: The government --

13 THE COURT: There's a motion by the government?

14 MR. SCHIFF: Yes. To dismiss count two of the
 15 superseding indictment.

16 THE COURT: All right. The motion is granted, and
 17 count two of the superseding indictment is dismissed.

18 Mr. King, you are committed to the custody of the
 19 United States Marshal. Court is adjourned.

20 (Proceedings concluded at 3:13 p.m.)

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